UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KIPP GIBBS, Plaintiff, v. GOLDEN EAGLE CREDIT CORP., Defendant.	)))))))	CIVIL ACTION NO. 03-11499-DPW

MEMORANDUM AND ORDER
September 30, 2004

The defendant responded to the complaint in this pro se action by moving to dismiss on grounds of failure to state a claim. At the hearing on that motion I raised sua sponte the question whether the complaint properly asserted subject matter jurisdiction because of uncertainty whether the amount in controversy threshold for diversity actions, 28 U.S.C. § 1332, would be met. I established a briefing schedule to develop the issue. The plaintiff timely filed a submission. The defendant has failed to do so, perhaps smugly secure in the belief that dismissal will be achieved one way or another without further effort. The question of dismissal on either ground is now ripe for determination.

Finding that the plaintiff's submission prevents me from concluding to a legal certainty that the jurisdictional amount cannot be met, I proceed to the question of the sufficiency of the claims and conclude the claims may not proceed. Accordingly, I will allow defendant's motion to dismiss.

In his "Statement of Damages" the plaintiff details his position that the "actual, general, special, compensatory damages [are] in the amount of $150,000 [and that] punitive damages [are] in the amount to $100,000 . . ." Id. at ¶ 12. A court may dismiss an action for insufficiency of the amount in controversy only when "from the face of the pleadings, it is apparent, to a legal certainty, . . . that the plaintiff never was entitled to recover" a sum in excess of the jurisdictional minimum. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938); see also Spielman v. Genzyme Corp., 251 F.3d 1,5 (1st Cir. 2001). Having reviewed plaintiff's submission in response to my scheduling order, I cannot say to a legal certainty that no one familiar with the tort law plaintiff attempts to assert would view his claims as incapable of generating damages in excess of the jurisdictional minimum. Rosario-Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 128 (1st Cir. 2004).

Turning to the sufficiency of the claims, however, I find that legal impediments make them not viable. The plaintiff's complaint arises from a dispute over the collection of lease payments for defendant's software, which the plaintiff claims defendant never actually delivered. The plaintiff contends that the manner of collection efforts including the manner of participating in judicial proceedings was improper. The plaintiff characterizes the defendant as engaging in threatening and harassing communications surrounding the dispute.

It appears from the plaintiff's submissions that he actually commenced an action for the recovery of $149.75 on September 3, 1998 on the Wareham District Court's small claims docket. The defendant responded on November 6, 1998 by seeking transfer to the regular civil docket asserting an intent as "Defendant, plaintiff in counterclaim . . . to file a counterclaim which is in excess of the jurisdiction limit of the small claim session." Plaintiff contends that, without ever filing a counterclaim the defendant, characterizing itself as plaintiff, sought summary judgment on July 15, 1999, in the amount of $2,072.58, including attorneys fees and costs. The motion was denied. Because neither party pressed the Wareham District Court matter in a timely fashion it was at some point thereafter dismissed.

Meanwhile, the defendant commenced a separate small claims action of its own in the Orleans District Court. On the day it came on for hearing, plaintiff appeared and filed his own counterclaim and pressed, even after defendant's counsel had agreed to dismiss the action, to have the matter resolved on the merits. Following hearing, judgment was entered on August 9, 2001 for plaintiff here (as defendant in the Orleans matter) and the counterclaim was dismissed without prejudice to permit the plaintiff to pursue the action he originally commenced in Wareham District Court, which unbeknownst to him had been dismissed for failure to prosecute.

Even with the additional submissions, plaintiff's complaint in this action is difficult to understand. To the degree he seeks to allege some shortcoming in the contract, either as a claim of breach (a claim plaintiff now says he is not making) or as a claim of fraudulent misrepresentation, such claims are plainly time barred. The four year period for lease contract claims and the three year period for fraud claims expired well before the plaintiff filed in this court. That the defendant is out of state does not toll the statutes of limitations.

To the degree the plaintiff is making claims of emotional distress, the complaint does not adequately plead essential elements of extreme and outrageous conduct utterly intolerable in a civilized community resulting in distress so severe that no reasonable person could be expected to endure it. Doyle v. Hasbro, Inc., 103 F.3d 186, 195 (1st Cir. 1996).

The plaintiff also asserts an abuse of process claim. In Massachusetts, the elements of an abuse of process claim are "(1) that process is used (2) for an ulterior or illegitimate purpose, (3) resulting in damage to the plaintiff." Refuse & Envt'l Sys., Inc. v. Indus. Servs. of Am., Inc., 932 F.2d 37, 41 (1st Cir. 1991). Abuse of process "has been described as a 'form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money." Savin Corp. v. Rayne, No. 00-CV-11728, 2001 U.S. Dist. LEXIS 20574, at *3 (D. Mass April 4, 2001)

(quoting Cohen v. Hurley, 20 Mass. App. Ct. 439, 442 (1985)).

The plaintiff contends that in response to his small claims action the defendant acted "as though it were the plaintiff" and "never filed a valid counterclaim" that exceeded the small claims limit. Compl. at ¶ 10-11. The effect, according to the plaintiff, of defendant's actions was to make the case "out of reach of the plaintiff." Id. at ¶ 11. In fact, the defendant's request to remove the action to the Civil Docket did not entail an attempt to pose as the plaintiff in the original case. As noted above, the "[d]efendant, plaintiff in counterclaim" intended "to filed a counterclaim which is in excess of the jurisdiction limit of the small claims session."[1] In addition, the case was not put "out of reach of the plaintiff." The plaintiff notes in his complaint that "[a]fter the case was moved to the civil docket ... [he] responded to an extensive interrogatory" and the defendant's motion for summary judgment was eventually denied. Id. at ¶ 11.

The plaintiff has failed to plead an abuse of process claim

[1]The source of the plaintiff's confusion likely derives from the first line of the defendant's motion to transfer, which begins "[n]ow comes plaintiff, defendant in counterclaim..." The correct wording, as it appears later in the motion, is "[d]efendant, plaintiff in counterclaim..." The plaintiff also notes that the defendant later "named itself as the plaintiff" when it filed a motion for summary judgment. The plaintiff offers no clear explanation for why, whether true or not, improperly designating itself as plaintiff constitutes an actionable wrong by the defendant.

adequately. He has offered no concrete "ulterior or illegitimate purpose" for the defendant's use of the judicial process apart from its desire to fully litigate the contractual questions forming the basis of the parties' dispute in this and previous actions.

The plaintiff also asserts a malicious prosecution claim. Despite the defendant's contention that the tort is limited to criminal prosecutions in Massachusetts,[2] malicious prosecution has been expanded to include civil actions. See Stephens Diversified Leasing v. Shalbey, No. 94-00377, 1995 Mass. Super. LEXIS 31, at *10-11 (Mass. Super. Sep. 7, 1995) (noting the tort's expansion in Massachusetts); see also Antelman v. Lewis, 480 F. Supp. 180, 186 (D. Mass 1979) ("In Massachusetts, the tort of malicious prosecution 'may be maintained for the unjustifiable initiation of a civil action.'") (quoting Hubbard v. Beatty & Hyde, Inc., 343 Mass. 258, 261 (1961)). The Restatement (Second)

[2]The defendant argues that "the institution of a criminal process...is a necessary element of the tort of malicious prosecution," citing Gutierrez v. Mass. Bay Trans. Auth., 437 Mass. 396 (2002). The Gutierrez court does lay out the traditional elements, including "the institution of criminal process," id. at 405, but does so by quoting J.R. Nolan & L.J. Sartorio, Tort Law § 77, at 88 (2d ed. 1989). Nolan & Sartorio's treatment of the issue does not end there, however, as they go on to note that the traditional elements have expanded to include the initiation of civil actions. Id. at 89-90. The court in Gutierrez also does not find that the tort is limited to its traditional elements, noting that "[i]n the civil context, probable cause is a matter for the jury if the facts are disputed." Gutierrez, 437 Mass at 405 n.10.

of Torts defines the wrongful use of civil proceedings as "tak[ing] an active part in the initiation, continuation, or procurement of civil proceedings against another. . . (a) . . . without probable cause, and primarily for a purpose other than that of securing adjudication of the claim in which the proceedings are based, and (b)... the proceedings have terminated in favor of the person against whom they are brought." Id. at § 674; see Powells v. Stevens, 17 Mass. L. Rep. 592, 2004 Mass. Super. LEXIS 184, at *26 (Mass. Super. May 3, 2004) ("The plaintiff must establish that the defendant had brought an original action maliciously and without probable cause and had suffered termination favorable to the plaintiff.").

The apparent source of the plaintiff's malicious prosecution claim is the action brought by the defendant in small claims court on August 9, 2001. There is no indication, however, that the defendant brought that action "maliciously and without probable cause." Therefore, the plaintiff has failed to plead a necessary element of a malicious prosecution claim.

Finally, the plaintiff's announced intention -- not yet fulfilled -- to bring a claim under 42 U.S.C. § 1983 would be futile. The dispute in this action is between two non-governmental parties over a private contract. The defendant is not a state actor. An essential element of this federal claim is not present. Consequently there is no federal question

jurisdiction. See generally, Vigueira v. First Bank, 140 F.3rd 12, 17 (1st Cir. 1998).

For these reasons, the defendant's motion to dismiss for failure to state a claim is hereby ALLOWED.

/s/ Douglas P. Woodlock

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DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE